IN THE

United States

Circuit Court of Appeals

For the Ninth Circuit

AMERICAN MINERAL PRODUCTION COMPANY, a corporation,
Plaintiff in Error,
vs.
F. M. HELSLEY,
Defendant in Error.

No. 3134

Brief of Defendant in Error

Upon Writ of Error to the United States District Court of the Eastern District of Washington, Northern Division.

ZENT & POWELL,
Spokane, Washington,
L. C. JESSEPH,
Colville, Washington,
Attorneys for Defendant in Error.

YOUNG PRINTING COMPANY, SPOKANE

IN THE

United States

Circuit Court of Appeals

For the Ninth Circuit

AMERICAN MINERAL PRODUCTION COMPANY, a corporation,
Plaintiff in Error,
vs.
F. M. HELSLEY,
Defendant in Error.

No. .....

Brief of Defendant in Error

Upon Writ of Error to the United States District Court of the Eastern District of Washington, Northern Division.

ZENT & POWELL,
Spokane, Washington,
L. C. JESSEPH,
Colville, Washington,
Attorneys for Defendant in Error.

STATEMENT OF THE CASE.

In the month of July, 1917, the defendant in error commenced this action in the Superior Court of Stevens County, Washington, against the plaintiff in error and one C. R. Cole to recover $5500.00,

the purchase price of six motor trucks described in the amended complaint. (Tr., p. 2.) Thereafter the cause was removed to the District Court of the United States for the Eastern District of Washington, Northern Division, and came on for trial on the 23rd day of April, 1918, before the court and a jury. The issues are very simple. It is alleged in the amended complaint that the plaintiff sold the motor trucks to the defendants and that the defendants purchased the same for the consideration above mentioned and judgment is asked for the amount of the purchase price. At the conclusion of all of the evidence a motion was made by the defendant in error for leave to amend his complaint so as to state a sale to the plaintiff in error, American Mineral Production Company, which was allowed, plaintiff in error refusing at that time to make any showing of prejudice although invited so to do by the court. (Tr., p. 104.) The defendants answered jointly denying all of the material allegations of the complaint and pleading affirmatively the statute of frauds. (Tr., pp. 4 and 5.) The affirmative defense was denied by a reply. The cause was tried and submitted to the jury upon the theories thus presented by the pleadings and no error is assigned upon the court's instructions.

The testimony shows that in the month of March, 1917, the defendant in error and one John Wilson, doing business under the firm name of Cashmere Truck Line, entered into a contract with the Amer-

ican Mineral Production Company to haul its magnesite ore from its quarries to the town of Valley in Stevens County, Washington. The co-partners entered upon the performance of this contract and continued to operate under the same until the 1st of June, 1917, when Wilson's interest in the co-partnership was taken over in the name of Cole, who at the time was president of the American Mineral Production Company. The hauling was then continued until about the 1st day of July, 1917, after which time the defendant in error did no hauling. On the 25th of June, 1917, Mr. Cole went to the town of Valley, where he met the defendant in error, and negotiations were commenced for the transfer of Helsley's interest in the trucks to the plaintiff in error. These negotiations were continued up to and including the 14th day of July, 1917, when they were finally consummated at the banking house of the Spokane & Eastern Trust Company in the City of Spokane. At that time Mr. Cole, acting as president of the plaintiff in error, and a Mr. T. P. Smith, who was really accountant for the company, purchased Helsley's interest in the trucks for the consideration of $5500.00, the money to be paid on the following Wednesday, July 18, 1917. Immediately after these negotiations were completed the defendant in error returned to Valley, delivered the trucks and his supply of gas and oil to the plaintiff in error, who accepted the same, and thereafter for a period of about one week operated all the trucks in the trans-

portation of magnesite from its quarries to the railroad at Valley, employed and paid the men who operated the trucks, and used the gas and oil which the defendant in error turned over to it. The plaintiff in error also organized what it chose to call a transportation department, having supervision of the operation of the trucks and the hauling of the magnesite, and placed at the head of such department a Mr. Moore, who prior to that time had been an employee of the company. At the time of this transaction the plaintiff in error was under written contract with the defendant in error to deliver to him at least 600 tons of magnesite a week for transportation from its quarries at Valley, Washington, at a price of $2.00 per ton and upon the consummation of this purchase and sale the plaintiff in error was relieved from the burdens of that contract, the company having failed to deliver the required amount of magnesite. (Tr., pp. 24 and 62; Exhibit 1.) The jury returned a verdict in favor of the defendant in error and against plaintiff in error in the sum of $5753.00, being the purchase price with interest, upon which verdict judgment was entered after a motion for a new trial had been overruled by the court.

ARGUMENT.

I.

It is contended by plaintiff in error that no contract or sale with or to the plaintiff in error was shown by the evidence in this case. This conten-

tion cannot be maintained. The defendant in error testified positively that he sold his interest in the trucks to the plaintiff in error for the sum of $5500.00, that he delivered the trucks and the gas and oil on hand into the possession of the plaintiff in error; that the plaintiff in error accepted such possession and operated the trucks and used the gas and oil in the transportation of its magnesite from its quarries to the town of Valley. These facts alone constitute a consummated transaction and passed the title in the trucks from the seller to the buyer. It would not seem necessary to cite authority to sustain this fundamental rule of law but since plaintiff in error has seen fit to raise the question defendant in error directs the attention of the court to the following authorities:

35 *Cyc.* 305 and 322;

Williams v. Ninemire, 23 Wash. 393;

Izett v. Stetson & Post Mill Co., 22 Wash. 300;

Lauber v. Johnson, 54 Wash. 59;

Skinner v. Griffiths & Sons, 80 Wash. 291.

All of the above authorities hold that on facts similar to those in this action the transaction constituted a sale. Furthermore, the trial court instructed the jury as follows:

> "Before the plaintiff can recover in this action, therefore, he must prove two facts: he must prove that a sale was made, as alleged in his complaint, and he must prove that the property was delivered to and accepted by the corporation. If you find from a preponder-

ance of the testimony offered here that there was a sale, that is, that there was an agreement between the parties on the part of the vendor to sell, and on the part of the purchaser to buy; that is, if you find that their minds met, and that the consideration was agreed upon, and the property was delivered and accepted by the corporation in furtherance of that sale, your verdict will be for the plaintiff for the amount claimed."

No exception was taken by plaintiff in error to this instruction and defendant in error contends it is binding upon all of the parties to this action.

II.

It is contended by plaintiff in error that because the transaction was not reduced to writing on the 14th day of July, 1917, it could not be considered as having been consummated. To sustain this contention authorities are cited on page 13 of the brief for plaintiff in error. We have no quarrel with the rule of law announced in these cases but the rule is not applicable to the case at bar, for the reason that the parties herein had met and discussed and agreed to all the terms and conditions and the transaction was finally consummated in accordance with the agreement then made, the property was delivered, accepted and used by the plaintiff in error to the exclusion of the defendant in error, thereby taking it out of the rule announced in the cases cited.

9 *Cyc.* 282;

Hodges v. Sublett, 91 Ala. 588; 8 So. 800.

Furthermore, it is a well established rule of law that whether there is or is not a sale depends upon the intention of the parties, which intention must be determined by the jury from all of the facts and circumstances surrounding the parties at the time. In the case at bar that question was squarely submitted to and passed upon by the jury as shown by the court's instruction which we have heretofore quoted.

35 *Cyc.* 278.

III.

Plaintiff in error contends that because the written consent of the vendor which had sold the trucks in question under a conditional sale contract was not obtained no title could be passed. If that were true, it was a complete and independent affirmative defense which should have been pleaded or at least the question should have been submitted and brought to the attention of the court and counsel at the time of the trial in order to give us a chance to meet it and the court an opportunity to instruct. Nothing of the kind, however, was done. The brilliant idea first appears in their brief in this case. The case having been tried, submitted and determined upon well-defined theories it is fundamental that the parties will not be permitted to suggest in the appellate court theories or objections not called to the attention of the lower court. Had this question been suggested, defendant in error was prepared by written evidence to establish the fact

beyond any question. On the other hand, the representative of the vendor, Mr. Kover, was present and participating and in close communication with them all the time.

IV.

It is also contended by plaintiff in error that under the law of the State of Washington a corporation cannot enter into a co-partnership. Suffice it to say, that we are not concerned with the question of partnership between the plaintiff in error and Helsley because it is not before the court. The only question to be passed upon here is whether or not Helsley, defendant in error, did not sell his interest in these trucks to the plaintiff in error, the question of partnership not entering into it in the remotest way. If the plaintiff in error did purchase Helsley's interest in the trucks it would not become a co-partnership with him on that account, for the moment it acquired his interest the partnership was entirely dissolved, assuming for the purposes of the argument only, that one had existed. There is no law in this state which precludes a corporation from buying partnership property or the interest of one partner and we are at a loss to understand how this question can have any bearing upon the case in any manner whatsoever.

V.

It is contended by plaintiff in error that Cole, who, it is admitted, was the president of the Amer-

ican Mineral Production Company, was without authority to purchase Helsley's interest in the trucks. (The record in this case is wholly silent with reference to any fact concerning this question.) The plaintiff in error had in its possession its by-laws and such other records as the company had seen fit to make with reference to the power and authority of its officers but it did not see fit to introduce such records in evidence in this action. If it is true, as contended by plaintiff in error, that its president had no authority, how easy it would have been to prove this fact by conclusive evidence. The fact that no such evidence was produced suggests to us that none existed. A discussion of the rules of law with reference to the power and authority of the president of a corporation will be found in:

10 *Cyc.* 903-1069-1087;
Annotated Cases 1913 (D) 643;
Annotated Cases 1913 (E) 846;
Annotated Cases 1916 (A) 474.

The question of the ratification of an unauthorized contract by a corporation is covered by the above citations which become pertinent in this case in view of the fact that plaintiff in error accepted the trucks and operated them to its own advantage.

VI.

It is next contended by plaintiff in error that having alleged a sale to Cole and the American Mineral Production Company jointly, and having

approved a sale to the corporation only, there was a material variance between allegation and proof. Defendant in error respectfully submits that there is no merit in this contention. At the close of plaintiff's case in chief, counsel moved the court separately for each of the defendants, challenging the sufficiency of the evidence and asking for a dismissal of the action as to each. The motion was first made on behalf of the defendant C. R. Cole and after some discussion, which will be found on pages 72 and 76, inclusive, was granted. The same motion was then made for the plaintiff in error and denied. No question of variance was raised by anyone at this time. At the close of all of the evidence in the case plaintiff in error again challenged the sufficiency of the evidence and moved the court for a dismissal, which was denied. (Tr., p. 103.) No question of a variance was made at this time by plaintiff in error. After the case had been argued and the court was ready to instruct he called attention of counsel to the fact that the complaint alleged a joint sale and that perhaps there could be no recovery unless the complaint was amended, so as to eliminate Cole entirely. At that time counsel for defendant in error moved the court for leave to make such an amendment, which was granted. At the same time the following took place:

> "MR. RUSSELL: I object to any amendment at this time. It seems to me that it comes rather late. If they found that Mr. Cole was not liable, then was the time, if any, when they

should have asked leave to change their pleadings. It seems to me that under the conditions here that we should make a motion to dismiss this case for the additional reason that there is a variance between the proof and the pleadings.

THE COURT: That objection was not called to my attention at the time the motion for non-suit was directed to the other defendant. Had it been, I probably would have directed a non-suit to both and allow the amendment. If you can show that you will be prejudiced at this time, except purely as technical defect, I will hear from you.

MR. RUSSELL: We submit it as we have it, and take an exception.

THE COURT: I will allow the amendment."

After having confessed at the time of the trial that it was not in position to show that it would be prejudiced if an amendment was allowed plaintiff in error cannot now raise the question of fatal variance. In conclusion defendant in error directs the attention of the court to the fact which is plainly disclosed by the record in this case, which is this. At the close of the plaintiff's case in chief on motion to that effect the defendant Cole was dismissed from the action because the proof showed that a sale had been made to the plaintiff in error and not to Cole individually. Immediately thereafter plaintiff in error proceeded to prove to the jury by the interrogatories of Cole and Smith that the sale was made in fact to Cole. It is respectfully submitted that the plaintiff in error in this case cannot blow its hands to make them warm and

its soup to make it cool. If the sale was not made to Cole then it was made to the plaintiff in error and we think this fact is abundantly established by the record before this court. In fact Cole as an individual had no use whatever for the trucks in controversy but the plaintiff in error did have use for them and did use them. The record also shows that counsel for the American Mineral Production Company were paid by the company for services rendered in connection with this transaction and the fact that Wilson's interest in the trucks had been taken in the name of Cole is explained by the further fact that Cole took most of the mineral bearing properties owned by the plaintiff in error in his own name. By purchasing Helsley's interest in the truck line the plaintiff in error got from under its contract to provide 600 tons of ore a week for transportation at $2.00 per ton. On the entire record it is respectfully submitted that the judgment of the trial court should be affirmed.

ZENT & POWELL,
Spokane, Washington,
L. C. JESSEPH,
Colville, Washington,
Attorneys for Defendant in Error.